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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE ALVARADO, Defendant and Appellant.	H040802 (Santa Clara County Super. Ct. No. C1347646)

Defendant Jose Alvarado pleaded no contest to possession of child pornography. (Pen. Code, § 311.11, subd. (a).) The trial court suspended imposition of sentence and granted a three-year term of probation with six months in county jail. Among other probation conditions, the trial court ordered Alvarado to participate in a sex offender management program as required by subdivision (b) of Penal Code section 1203.067 (section 1203.067). On appeal, Alvarado challenges several probation conditions and requests a correction to the minutes of the sentencing hearing.

First, Alvarado contends that a probation condition mandated by section 1203.067(b)(3), requiring him to waive any privilege against self-incrimination as part of his participation in the sex offender management program, violates his constitutional right not to incriminate himself.[1] We hold this waiver requirement violates the Fifth Amendment as construed by *Minnesota v. Murphy* (1984) 465 U.S. 420 (*Murphy*).

[1] These issues are currently before the California Supreme Court. (See *People v. Garcia* (2014) 224 Cal.App.4th 1283, review granted July 16, 2014, S218197.)

Second, Alvarado contends the probation condition mandated by section 1203.067(b)(3), requiring him to participate in polygraph examinations, is unconstitutionally overbroad absent a narrowing construction. We conclude Alvarado may be required to participate in polygraph examinations to the extent the questions posed to him relate to the successful completion of the sex offender management program and the crime of which Alvarado was convicted.

Third, Alvarado contends the probation condition mandated by section 1203.067(b)(4), requiring him to waive the psychotherapist-patient privilege, violates his constitutional right to privacy. We construe the waiver of the psychotherapist-patient privilege as requiring waiver only insofar as necessary to enable communication between the supervising probation officer and the sex offender management professional. Construed in this fashion, we uphold this waiver as constitutional.

Fourth, Alvarado contends several probation conditions are unconstitutionally vague in the absence of scienter requirements. The Attorney General concedes this claim. Accordingly, we will modify the challenged conditions to incorporate scienter elements.

Fifth, Alvarado contends a probation condition limiting his use of computers requires clarification due to conflicting statements by the trial court concerning the condition. We construe the condition as it is set forth in the written probation conditions and we conclude the condition as so construed is not unconstitutionally vague.

Finally, Alvarado contends the minutes of the sentencing hearing misstate the amount of the restitution fine. We conclude the minutes reflect the proper amount of the restitution fine plus the administrative fee attached to it.

We will modify the challenged probation conditions as described above, and we will affirm the judgment as modified.

I. PROCEDURAL BACKGROUND[2]

In January 2013, the prosecution charged Alvarado by felony complaint with one count of possessing matter depicting a minor engaging in or simulating sexual conduct. (Pen. Code, § 311.11, subd. (a).) In July 2013, Alvarado pleaded no contest to the count as charged. In January 2014, the trial court suspended imposition of sentence and granted a three-year term of probation to include six months in county jail. The court also imposed a restitution fine of $240 plus a 10 percent administrative fee.

Among other probation conditions, the trial court imposed various conditions mandated by section 1203.067, which requires participation in a sex offender management program. The court ordered Alvarado to "waive any privilege against self-incrimination and participate in polygraph examinations, which shall be part of the sex offender management program" under section 1203.067(b)(3). The court also ordered Alvarado to "waive any psychotherapist-patient privilege to enable communication between the sex offender management professional and the Probation Officer" under section 1203.067(b)(4). Alvarado objected to these conditions as overbroad; vague; unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*); and unconstitutional under the Fifth and Fourteenth Amendments to the federal Constitution, among other provisions. The trial court overruled these objections on the ground that probationers may waive their constitutional rights by agreeing to probation. The court found the conditions reasonably related to the offense and narrowly tailored to completion of the sex offender management program.

The trial court also imposed other conditions at issue here. First, the court ordered that Alvarado "not purchase or possess any pornographic or sexually explicit material as defined by the probation officer." Second, the court ordered that Alvarado "not frequent, be employed by nor engage in any business where pornographic materials are openly

[2] The record contains no statement of the facts.

exhibited." Alvarado objected to these conditions as overbroad. Third, the court ordered, "You shall not access the internet or any other online service through use of computer or other electronic device at any location, including your place of employment, without prior approval by probation, and you shall not possess or use any data encryption technique." The court also stated that Alvarado would be able to have a computer or laptop device "for educational and employment purposes only as long as it is monitored by probation."

II. DISCUSSION

A. *Waiver of Any Privilege Against Self-Incrimination*

Alvarado challenges the probation condition requiring him to waive any privilege against self-incrimination as part of his participation in the sex offender management program. He contends this condition violates the Fifth Amendment's Self-Incrimination Clause. The Attorney General contends the condition does not violate the Fifth Amendment because Alvarado's statements could not be used against him in a criminal proceeding. We conclude the condition violates the Fifth Amendment under *Murphy*, *supra*, 465 U.S. 420.

1. *Legal Principles*

"In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) Nevertheless, probation conditions may be challenged on constitutional grounds. (*In re Sheena K.* (2007) 40 Cal.4th 875, 886.)

"The Fifth Amendment, in relevant part, provides that no person 'shall be compelled in any criminal case to be a witness against himself.' " (*Murphy, supra*, 465 U.S. at p. 426.) A probationer retains this right. "A defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those

statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted." (*Ibid.*)

2. *The Waiver Requirement Violates the Fifth Amendment*

In *Murphy*, the United States Supreme Court held that prohibiting a probationer from legitimately invoking the Self-Incrimination Clause would violate the Fifth Amendment. "Our decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." (*Murphy*, *supra*, 465 U.S. at p. 438.) The high court grounded this principle in its longstanding "penalty cases" jurisprudence prohibiting compelled waivers of the Fifth Amendment under threat of penalty. (See *Lefkowitz v. Cunningham* (1977) 431 U.S. 801; *Lefkowitz v. Turley* (1973) 414 U.S. 70; *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation* (1968) 392 U.S. 280, 283; *Gardner v. Broderick* (1968) 392 U.S. 273, 276.) The California Supreme Court has acknowledged the same general principle: "One cannot be forced to choose between forfeiting the privilege, on the one hand, or asserting it and suffering a penalty for doing so on the other." (*Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 714 (*Spielbauer*).) Because a compelled waiver has the same effect as prohibiting invocation of the privilege under threat of penalty, the probation condition at issue here is unconstitutional under *Murphy* and *Spielbauer*. (*People v. Forney* (2016) 3 Cal.App.5th 1091, 1102 [probation condition requiring waiver of Fifth Amendment is unconstitutional under *Murphy*].)

The Attorney General contends the waiver is constitutional under the "penalty cases" jurisprudence because any incriminating admissions by Alvarado would be not be admissible against him. For this proposition, she relies on the following passage from *Murphy*: "[I]f the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution."

(*Murphy, supra*, 465 U.S. at p. 435.) But this passage underscores the unconstitutional nature of a compelled waiver. The probationer's answers would be "inadmissible in a criminal prosecution" precisely because the violation of the Fifth Amendment requires exclusion of the resulting statements. More importantly, the Attorney General does not explain how Alvarado could invoke his privilege against self-incrimination in a criminal prosecution once he has already waived the privilege as required by the probation condition. (See *Chavez v. Martinez* (2003) 538 U.S. 760, 769 [once a waiver is signed, the signatory is unable to assert a Fifth Amendment objection to the subsequent use of his statements in a criminal case, even if his statements were in fact compelled] (plur. opn. of Thomas, J.).)

For these reasons, we hold the probation condition requiring Alvarado to waive any privilege against self-incrimination as part of the sex offender management program is unconstitutional under the Fifth Amendment. We will strike the language imposing the waiver.

B. *Participation in Polygraph Examinations*

Alvarado contends the probation condition requiring him to participate in polygraph examinations is unconstitutionally overbroad and must therefore be more narrowly construed under *Lent, supra*. The Attorney General contends the condition is already narrowly tailored to meet the purposes of the sex offender management program.

"[A] condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Lent, supra*, 15 Cal.3d at p. 486.) The requirement that defendant participate in polygraph examinations is valid under *Lent* if the questions posed to him are reasonably related to his successful completion of the sex offender management program and the crime of which he was convicted. (See *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321 [under *Lent*, "the order imposing a polygraph condition must limit the questions allowed to those relating to the successful

completion of the stalking therapy program and the crime of which Brown was convicted"].)

Section 1203.067(b)(3) mandates that participation in polygraph examinations "shall be part of the sex offender management program." In view of that language, we construe the probation condition's requirement of participation in polygraph examinations as allowing only questions relating to the successful completion of the sex offender management program and the crime of which Alvarado was convicted. So construed, we will uphold the condition as sufficiently narrow to satisfy the overbreadth requirements of *Lent*.

C. *Waiver of the Psychotherapist-Patient Privilege*

Alvarado contends the condition requiring him to waive the psychotherapist-patient privilege violates his federal constitutional right to privacy and his statutory right to confidentiality under Evidence Code section 1014. The Attorney General contends the condition is both statutorily and constitutionally valid.

"The psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy. [Citations.] It is also well established, however, that the right to privacy is not absolute, but may yield in the furtherance of compelling state interests." (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511.) The Legislature has explained that the purpose of the waiver of the psychotherapist-patient privilege is to "enable communication between the sex offender management professional and supervising probation officer." (Pen. Code, § 1203.067, subd. (b)(4).) Such communication is an important part of the sex offender management program all sex offenders placed on formal probation on or after July 1, 2012, are statutorily mandated to complete. (Pen. Code, §§ 1203.067, subd. (b)(2), 290.09, subd. (c) [sex offender management professional must communicate with the probation officer about the probationer's "progress in the program and dynamic risk assessment issues"].) Thus, we find that the state's interest in furthering such communication is legitimate and

substantial and the psychotherapist-patient privilege waiver supports the compelling state interest in "enhanc[ing] public safety and reduc[ing] the risk of recidivism posed by [sex] offenders." (Pen. Code, § 290.03, subd. (a).)

The question remains, however, whether the scope of the probation condition is properly tailored to the state's interest. The condition contains broad language, requiring the waiver of "*any* psychotherapist-patient privilege," regardless of the subject matter of the communication or the level of risk to public safety absent disclosure. But, unlike the language of the waiver of the privilege against self-incrimination, this broad language is followed by the phrase "to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09." This additional language limits what may be done with the probationer's communications once they are revealed.

We will therefore narrowly construe the statute as requiring a waiver of the psychotherapist-patient privilege only insofar as it is necessary "to enable communication between the sex offender management professional and supervising probation officer . . . ." (Pen. Code, § 1203.067, subd. (b)(4).) Specifically, we hold that Alvarado may constitutionally be required to waive the psychotherapist-patient privilege only to the extent necessary to allow the sex offender management professional to communicate with the supervising probation officer. Furthermore, the supervising probation officer may communicate Alvarado's scores on the state-authorized risk assessment tool for sex offenders to the Department of Justice to be made accessible to law enforcement as required under Penal Code section 290.09, subdivision (b)(2). (Pen. Code, §§ 290.04, 290.09, subd. (b)(2).) This narrow interpretation of the statute allows the psychotherapist to communicate with the probation officer as necessary, furthering the purposes of the exception as set forth in the statute. Apart from these exceptions, neither the psychotherapist nor the probation officer may relay protected communications to some

other third party under the waiver, and Alvarado's privacy rights based on the psychotherapist-patient privilege otherwise remain intact.[3]

D. *Scienter Requirements*

Alvarado contends three of the probation conditions are unconstitutionally vague in the absence of scienter requirements. First, he contends the condition that he "not purchase or possess any pornographic or sexually explicit material as defined by the probation officer" should be modified to prohibit only knowing possession of such materials. Second, he contends the condition that he "not possess or use any data encryption technique" should be modified to prohibit knowing use or possession of a data encryption technique. Third, he contends the condition that he "not frequent, be employed by nor engage in any business where pornographic materials are openly exhibited" should be modified to prohibit "visiting, remaining in, being employed by, or engaging in any business where defendant knows that pornographic materials are openly exhibited." He also challenges the term "frequent" as unconstitutionally vague.

The Attorney General concedes the conditions should be modified to include scienter requirements, and she agrees with Alvarado's proposed modifications to the second and third of these three conditions. As to the first condition, she contends there are certain materials that Alvarado would know or reasonably should know are pornographic or sexually explicit. Accordingly, she proposes the condition be modified to state that Alvarado "not knowingly purchase or possess materials that [he] know[s] or

[3] As to the statutory psychotherapist-patient privilege under Evidence Code section 1014, to the extent the statute conflicts with the waiver requirement, it is the later, more specific statute that controls. (*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1550, quoting *Young v. Haines* (1986) 41 Cal.3d 883, 894; *Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757.) Because the Legislature enacted subdivision (b)(4) of section 1203.067 after it enacted Evidence Code section 1014, and because the former is more specific than the latter, we conclude the waiver requirement supersedes the evidentiary privilege. (Stats. 2010, ch. 219, § 17; Stats. 1994, ch. 1010, § 106.)

reasonably should know are pornographic or sexually explicit." Alvarado made no objection to this modification in his reply brief.

Courts have consistently ordered modification of probation conditions to incorporate a scienter requirement where a probationer could unknowingly engage in the prohibited activity. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 912-913 [modifying probation condition to prohibit knowing presence of weapons or ammunition]; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816 [modifying prohibition on association with gang members to prohibit association with known gang members]; *In re Kacy S.* (1998) 68 Cal.App.4th 704, 713 [modifying probation condition that defendant not associate with any persons not approved by his probation officer].) Without an express knowledge requirement, Alvarado could unwittingly violate the condition that he not possess pornographic materials. For example, another person could leave pornographic or sexually explicit material in Alvarado's car or home without his knowledge. Or he could pick up a book or a magazine without knowing it contains prohibited material. Similarly, he could unknowingly possess or use a data encryption technique program, particularly given that data encryption is ubiquitous in modern computer technology. He could also unknowingly visit a business where prohibited materials are openly exhibited.
To enforce a probation violation for unknowing possession of the prohibited materials or unknowing violation of the location restriction would violate the principles set forth in *In re Sheena K.*, supra, 40 Cal.4th at p. 890 [a probation condition must be sufficiently precise for the probationer to know what is required of him].) Therefore, we shall modify these probation conditions as agreed upon by the parties.

E. *Limitations on Alvarado's Use of Computers*

Alvarado contends the trial court made vague and conflicting statements regarding his use of computers. The court imposed a probation condition requiring that Alvarado "not access the internet or any other online service through use of computer or other electronic device at any location, including [his] place of employment, without prior

approval by probation . . . ." However, the court also stated that Alvarado would be able to have a computer or laptop device "for educational and employment purposes only as long as it is monitored by probation." Alvarado contends these orders require clarification because the phrase "monitored by probation" does not necessarily mean the same thing as "prior approval by probation." The Attorney General contends the court's oral statement concerning monitoring by probation did not constitute a separate condition of probation.

The record suggests that when the court referred to "monitor[ing] by probation," the court was simply describing the written conditions of probation. As the Attorney General points out, the written conditions require prior approval by the probation officer before Alvarado accesses the internet or other online services. Another written condition requires that "[Alvarado's] computer shall be subject to Forensic Analysis search." These constitute forms of "monitoring" by probation, and nothing in the trial court's statements imposed any additional level of monitoring. Whatever possible interpretations Alvarado puts forth regarding the trial court's oral statement, we will construe the statement as a nothing more than a reference to the written probation conditions regarding his use of computers. Alvarado makes no other arguments challenging those written conditions.

F. *Amount of the Restitution Fine*

The trial court imposed "a restitution fine of $240 plus [a] 10 percent administrative fee to be imposed pursuant to the Penal Code . . . ." The minutes of the sentencing hearing list a total restitution fine of $264. Alvarado contends the minutes are in error. But as the Attorney General points out, the amount of $264 includes the 10 percent administrative fee, equal to $24, as added to the base amount of $240. (Pen. Code, § 1202.4, subd. (l).) We conclude the minutes are correct.

III. DISPOSITION

The probation conditions are modified as follows: (1) the words "waive any privilege against self-incrimination and" are stricken from probation condition No. 2; (2) probation condition No. 15 is modified to state that "Alvarado shall not knowingly purchase or possess materials that he knows or reasonably should know are pornographic or sexually explicit;" (3) probation condition No. 16 is modified to state that "Alvarado shall not knowingly visit or remain in, be employed by, or engage in, any business where pornographic materials are openly exhibited;" and (4) the second sentence of probation condition No. 17 is modified to state that "Alvarado shall not knowingly possess or use any data encryption technique program." As so modified, the judgment is affirmed.

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WALSH, J.*

I CONCUR:

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RUSHING, P.J.

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*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Grover, J., Concurring

I concur in the majority opinion except for section II.D. Respectfully, I do not join the majority's reasoning regarding probation conditions 15 and 16, because I do not believe an express scienter element is legally required in those conditions. Nonetheless, I concur in the disposition, as there is no harm in the majority's modifications and Respondent does not object.

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Grover, J.